State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL
150 South Main Street • Providence, RI 02903
(401) 274-4400 - TDD (401) 453-0410

Peter F. Kilmartin, Attorney General

March 21, 2011
PR 11-06
OM 11-06

Mr. Ronald J. Beagan
PO Box 891
Greenville, Rhode Island 02828

RE: Beagan v. Albion Fire District [November 4, 2010 OMA complaint]
Beagan v. Albion Fire District [November 1, 2010 APRA complaint]

Dear Mr. Beagan:

The investigations into your Access to Public Records Act ("APRA") and Open Meetings Act ("OMA") complaints against the Albion Fire District ("Fire District") are complete. By two (2) separate complaints dated November 1, 2010 and November 4, 2010, you allege that the Fire District committed multiple APRA and OMA violations.

Specifically, in your first complaint dated November 1, 2010, you allege that the Fire District violated the APRA when it failed to provide you with the minutes of its February 1, 2006, May 23, 2006, May 31, 2006, July 11, 2006 and August 8, 2006 meetings with ten (10) business days. You also allege that the Fire District failed to respond to your September 29, 2010 request for records pertaining to a certain property. In addition, you allege that the Fire District violated the APRA by failing to provide you with a "Rules & Regs Letter given to the commissioners by the chief at the February 14, 2006 meeting" ("Rules & Regs Letter") and "a memo from the District's Attorney regarding the Rules & Regs Letter given to the commissioners by the chief at the February 14, 2006 meetings" ("Memorandum by Attorney Daniel McKinnon") within ten (10) business days of your request. You further complain that the Rules & Regs Letter later provided to you was not responsive to your request and that portions of the memorandum by Attorney Daniel McKinnon were redacted despite your claim that this memorandum was submitted to all of the Board members during an open session. You further allege that the Fire District violated the APRA and OMA[1] by failing to maintain minutes of its May 8, 2006 and June 7, 2006 meetings and for its June 13, 2006 closed session. Your last allegation is that the Fire District violated the APRA by failing to respond to your petitions for review dated October 12, 2010 and October 15, 2010.

[1] This allegation is also contained in your November 4, 2010 complaint.

In your second complaint dated November 4, 2010, you allege that the agendas for the August 10, 2010 and September 22, 2010 meetings of the Fire District violated the OMA. Specifically, you allege that the agendas did not contain "a statement specifying the nature of the business to be discussed" and that the Fire District discussed and/or voted upon many issues at its August 10, 2010 and September 21, 2010 meetings that were not posted on the agendas for those meetings. In particular, you claim that the Fire District discussed and voted upon unadvertised items under the broad agenda items "New Business" and "Good and Welfare."

At the outset, we note that in examining whether a violation of the OMA and/or APRA has occurred, we are mindful that our mandate is not to determine whether this Department believes that an infraction has occurred, but instead, to interpret and enforce the OMA and APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Fire District violated the OMA and/or APRA. See R.I. Gen. Laws § 42-46-8; R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

FIRST COMPLAINT – dated November 1, 2010

We begin with the APRA allegations contained within your November 1, 2010 complaint.

The APRA states that, unless exempt, all records maintained by any public body shall be public records and every person shall have the right to inspect and/or to copy such records. See R.I. Gen. Laws § 38-2-3(a). To effectuate this mandate, the APRA provides procedural requirements governing the time and means by which a request for records is to be processed. Upon receipt of a records request, a public body is obligated to respond in some capacity within ten (10) business days, either by producing responsive documents, denying the request with a reason(s), or extending the time period necessary to comply. See R.I. Gen. Laws § 38-2-7. If a public body needs additional time to respond to an APRA request, the APRA provides that a public body, "for good cause," may extend the response time an additional twenty (20) business days to a total of thirty (30) business days. R.I. Gen. Laws § 38-2-7(b). Also, the "[f]ailure to comply with a request to inspect or copy the public record within the ten (10) business day period shall be deemed to be a denial." Id. Any denial of the right to inspect or copy records must be "in writing giving specific reasons for the denial...and indicating the procedures for appealing the denial." R.I. Gen. Laws § 38-2-7(a). Notwithstanding the above,"[n]othing in [the APRA] shall be construed as requiring a public body to reorganize, consolidate, or compile data not maintained by the public body in the form requested at the time the request to inspect the public records was made . . . ." R.I. Gen. Laws § 38-2-3(f).

In response to your November 1, 2010 complaint, this Department received a substantive response dated February 4, 2011 and March 10, 2011 from the Fire District's legal counsel, Louis A. DeSimone, Esquire. From the outset, Attorney DeSimone contends that the Fire District timely responded to all of your APRA requests. Specifically, Attorney DeSimone, represented, in pertinent part that: "[i]n each of the instances set forth in your [APRA complaint] the clerk of the district had provided [you] a timely response . . . and that [he has] contacted the clerk of the district and will provide an affidavit [to this Department] detailing each response with respect to the dates [you] addressed [in your complaint]." Thereafter, Attorney DeSimone provided this Department with the affidavit of the Clerk of the Fire District, Lois Moore, whom

provided us with "documents [that the Clerk claims] constitute responses from the Albion Fire District with regard to [APRA] requests for records made by [you]."[2] Upon reviewing these documents and all of the other evidence presented, this Department concludes as follows:

A. The Fire District violated R.I. Gen. Laws § 38-2-7(a) when it failed to provide you with minutes of its February 1, 2006, May 23, 2006 and May 31, 2006 meetings within ten (10) business days of your APRA requests. The Fire District did not violate R.I. Gen. Laws § 38-2-7(a) by failing to respond to your September 29, 2010 request for records pertaining to a certain property.

As explained above, the Fire District was obligated to respond to your APRA requests in writing within ten (10) business days, either by producing responsive documents, denying the request with a reason(s), or extending the time period necessary to comply. See R.I. Gen. Laws § 38-2-7. Contrary to Attorney DeSimone's assertions, the evidence presented reveals that the Fire District failed to do so here. First, although the Fire District responded to your August 18, 2010 request for minutes of the January 2006 and February 2006 meetings on August 23, 2010, it failed to provide you with all of the documents responsive to your request, specifically the minutes of the February 1, 2006 meeting.[3] The Fire District did not provide you with the minutes of the February 1, 2006 meeting until September 8, 2010, more than ten business days after your August 18, 2010 request, nor did the Fire District provide any evidence that it extended the time to respond for "good cause." Second, the Fire District responded to your September 3, 2010 request for minutes of the May 2006 and June 2006 meetings on September 20, 2010, which was within ten (10) business days, but did not provide you with the minutes of the May 23, 2006 and May 31, 2006 meetings until October 8, 2010, which was more than one month after your request.[4] Accordingly, we must conclude that the Fire District violated the APRA when it failed to properly respond to your August 18, 2010 and September 3, 2010 requests within ten business days.

With respect to your September 29, 2010 request,[5] the evidence reveals that the Fire District responded within ten (10) business days by letter dated October 13, 2010, indicating that

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[2] Although the correspondence submitted by Clerk Moore contain no signatures, Clerk Moore attests that "[i]n [the] capacity as keeper of the records, [the Clerk has] examined the records of the district and hereby state that the attachments are part of the official records of the Albion Fire District and kept in the ordinary course of business." Since you do not contest this assertion we will not address the authenticity of these documents.

[3] By letter dated August 23, 2010, the Fire District only provided you with the open and closed session minutes of the January 10, 2006 and February 14, 2006 meetings.

[4] By letter dated September 20, 2010, the Fire District provided you with the open and closed session minutes for the May 9, 2006 meeting and the closed minutes of the June 13, 2006 meeting. In that same letter, the Fire District indicated that it had no public record for the minutes of the June 13, 2006 closed meeting. The Fire District's September 20, 2010 letter does not address its May 8, 2006 or June 7, 2006 minutes.

[5] On September 29, 2010, you requested to inspect and/or copy "[t]he archived, computer-stored, public records from Mr. McKenna for the property: [address omitted]."

except for records made available to you at a prior meeting, the Fire District had no responsive records. Although the Fire District's response violated the APRA because it failed to indicate the procedure for appeal, see R.I. Gen. Laws § 38-2-7(a), it responded in a timely manner and did not violate the APRA in this respect.

B. The Fire District did not violate R.I. Gen. Laws § 38-2-7(a) since it provided you with documents responsive to your request for the minutes of the July and August 2006 meetings within ten (10) business days of your request.

Although the Fire District timely responded to your September 29, 2010 request for the minutes of the July 2006 and August 2006 meetings on October 5, 2010, you claim that it failed to provide you with all of the documents responsive to that request, specifically the minutes of the July 11, 2006 and August 8, 2006 meetings.[6] The Clerk of the Fire District contends that you were not provided the minutes of the July 11, 2006 and August 8, 2006 meetings because those meetings did not take place and were subsequently replaced by July 18, 2006 and August 16, 2006 meetings. Our review of the evidence presented reveals that the July 11, 2006 and August 8, 2006 meetings were in fact replaced by the July 18, 2006 and August 16, 2006 meetings and that the Fire District provided you with the minutes of the July 18, 2006 and August 16, 2006 meetings on October 5, 2010.

As explained above, "[n]othing in [the APRA] shall be construed as requiring a public body to reorganize, consolidate, or compile data not maintained by the public body in the form requested at the time the request to inspect the public records was made . . . ." R.I. Gen. Laws § 38-2-3(f). Here, because these meetings were canceled, the Fire District did not possess the minutes of the July 11, 2006 and August 8, 2006 meetings and therefore, in an effort to comply with your request, provided you with documents that it believed were responsive. We find that the documents provided, i.e., minutes to the July 18, 2006 and August 16, 2006 meetings, were in fact responsive to your request. While we recognize that the Fire District could have avoided any confusion in this regard by noting that the July 11, 2006 and August 8, 2006 meetings had been rescheduled in their October 5, 2010 letter to you, we cannot conclude that the Fire District violated the APRA by failing to provide you minutes of the July 11, 2006 and August 8, 2006 meetings since minutes for those meetings do not exist.

C. The Fire District did not violate R.I. Gen. Laws § 38-2-7(a) by failing to provide you with the Rules & Regs Letter given to the commissioners by the chief at the February 14, 2006 meeting and the memorandum by Attorney Daniel McKinnon within ten (10) business days of your request.

"[I]n order for this Department to have jurisdiction to inquire into an APRA matter, the complainant must first have requested a record from a public body, and second, the complainant must have been denied access to the requested record." Schmidt v. Ashaway Volunteer Fire Association, PR 99-21; see also Smith v. Watch Hill Fire District, PR 99-15; Orabona v. Scituate School Department, PR 10-13; Campbell v. Coastal Resources Management Council,

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[6] By letter dated October 5, 2010, the Fire District provided you with minutes of the July 18, 2006 and August 16, 2006 meetings.

PR 08-33. Respectfully, in this case, you have presented no evidence that an APRA request for the Rules & Regs Letter and the memorandum by Attorney Daniel McKinnon was ever made by you. Specifically, your August 18, 2010 APRA request did not include a request for these two documents.[7] Although you relate that you informed the Clerk that you had not received the Rules & Regs Letter and memorandum by Attorney Daniel McKinnon on August 24, 2010 and September 24, 2010, respectively, you have presented no documentation to support your claim that you made an APRA request for these documents. Accordingly, we cannot conclude that the Fire District violated the APRA by failing to provide you with these records since an APRA request was never made by you.[8]

D. The Fire District violated R.I. Gen. Laws § 42-46-7(a) and R.I. Gen. Laws § 38-2-3(b) by failing to maintain minutes of its May 8, 2006 and June 7, 2006 meetings and its June 13, 2006 closed session.

Under the OMA, "[a]ll public bodies shall keep written minutes of all their meetings." R.I. Gen. Laws § 42-46-7(a). "The minutes shall include, but need not be limited to: (1) The date, time, and place of the meeting; (2) The members of the public body recorded as either present or absent; (3) A record by individual members of any vote taken; and (4) Any other information relevant to the business of the public body that any member of the public body requests be included or reflected in the minutes." Id. The OMA further requires that "[t]he minutes shall be public records and unofficial minutes shall be available, to the public at the office of the public body, within thirty five (35) days of the meeting or at the next regularly scheduled meeting, whichever is earlier . . . ." R.I. Gen. Laws § 42-46-7(b). Similarly, the APRA requires that "[e]ach public body shall make, keep, and maintain written or recorded minutes of all meetings." R.I. Gen. Laws § 38-2-3(b).

You further allege that the Fire District violated the OMA and the APRA by failing to keep written minutes of several of its meetings. Specifically, you indicate that in response to your September 3, 2010 request for minutes of the May 2006 and June 2006 meetings, the clerk of the Fire District informed you "that there are no public record minutes of the May 8, 2006 and June 7, 2006 meetings" and "there is no public record of the Closed Session Minutes of June 13, 2006." Attorney DeSimone does not address these allegations in his substantive response. Thus, the only evidence that this Department has supports that the Fire District failed to maintain minutes for the meetings in question. As outlined above, both the OMA and the APRA require that all public bodies keep written minutes of their meetings. Accordingly, this Department must conclude that the Fire District violated the OMA and APRA when it failed to keep minutes for its May 8, 2006, and June 7, 2006 meetings, as well as its June 13, 2006 closed session.

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[7] Your August 18, 2010 request only included a request for the minutes of the January 2006 and February 2006 meetings.

[8] Since we conclude that no APRA request was made by you for the Rules & Regs Letter and the memorandum by Attorney Daniel McKinnon, this finding will not address any additional arguments you have made relating to these two documents.

E. The Fire District did not violate R.I. Gen. Laws § 38-2-8 when it failed to respond to your petitions for review within ten (10) business days.

The APRA provides that:

> "Any person or entity denied the right to inspect a record of a public body by the custodian of the record may petition the chief administrative officer of that public body for a review of the determinations made by his or her subordinate. The chief administrative officer shall make a final determination whether or not to allow public inspection within ten (10) business days after the submission of the review petition." R.I. Gen. Laws § 38-2-8(a).

In this case, you submitted three "Review Petitions for Denial of Access to Public Records" in response to the Fire District's alleged failure to provide you with certain meeting minutes and other documents requested by you. Your first review petition dated October 12, 2010 was in response to the Fire District's alleged failure to provide you with the minutes of the July 11, 2006 and August 8, 2006 meetings. As we explained above, our review of the evidence presented reveals that the July 11, 2006 and August 8, 2006 meetings were replaced or substituted by the July 18, 2006 and August 16, 2006 meetings and that the Fire District provided you with the minutes of the July 18, 2006 and August 16, 2006 meetings on October 5, 2010. Since you were provided with responsive documents prior to your October 12, 2010 review petition, the Fire District was not obligated to respond to your review petition. Your second review petition also dated October 12, 2010 was in response to the Fire District's alleged failure to provide you with the Rules & Regs Letter and the memorandum by Attorney Daniel McKinnon. Since you never made an APRA request for these two documents the Fire District was not obligated to respond to your second review petition dated October 12, 2010. Upon review of your third review petition dated October 15, 2010, it is clear that you requested the chief administrative officer for the Fire District to review what you contend was the Fire District's failure to respond to your September 29, 2010 APRA request for records pertaining to a certain property. The evidence demonstrates, however, by the time you filed your October 15, 2010 review petition, the Fire District had indeed responded to your APRA request by letter dated October 13, 2010. Given these facts, we conclude that the Fire District did not violate the APRA in regards to this allegation.

SECOND COMPLAINT – dated November 4, 2010

Next, we address the OMA allegations contained within your second complaint.

A. **The Fire District violated R.I. Gen. Laws § 42-46-6 by posting inadequate agendas for its August 10, 2010 and September 21, 2010 meetings.**

You specifically allege that the agendas for the August 10, 2010 and September 21, 2010 meetings were inadequate since they did not contain "a statement specifying the nature of the business to be discussed." You further contend that the Fire District discussed and voted upon many issues under the broad agenda items "NEW BUSINESS" and "GOOD and WELFARE" that were unadvertised.

In response to your November 4, 2010 complaint, this Department received a response dated February 4, 2011 from the Fire District's legal counsel, Louis A. DeSimone, Esquire. Attorney DeSimone, in pertinent part, wrote:

> "With regard to the meeting of August 10, 2010, the discussions held by the commission under new business were in the nature of a report from the chief of the fire district. In fact, the board consented to administrative issues which were informational from the standpoint of the daily workings of the fire district. Factually, the fire chief is responsible for the operational areas of the fire district. The items reported as Glacial Energy bill and EMT program are ordinary business of the department which the chief handles pursuant to the authority of the position. Formal votes are not required for the daily or conduct of business by the fire district. The monies referenced are budgeted and approved on a line by line basis at the annual taxpayers meeting each October in accordance with the charter and by-laws of the district. With respect to the clerk entry, the position and compensation had been agreed to at a meeting of the Consolidation Committee prior to the meeting in question.
>
> With regard to the item "Good and Welfare," no action was taken by the commission other that [sic] a reference to keeping correspondence on file. It should be noted that these actions of filing documents are part of the duties of the clerk of the district in her ordinary course of business.
>
> With respect to the September 21, 2010 meeting, the item referenced in the minutes under the term "New Business" involves daily department business and general administrative practice which was designed to lower the cost of services provided as a means of advising the commissioners collectively of the activities of the department. Again, with regard to the "Good and Welfare" section of the minutes, there was no action taken other that [sic] the filing of correspondence which is done routinely by the clerk."

The OMA requires that:

> "Public bodies shall give supplemental written public notice of any meeting within a minimum of forty-eight (48) hours before the date. This notice shall include the date the notice was posted, the date, time and place of the meeting, and a statement specifying the nature of the business to be discussed." R.I. Gen. Laws § 42-46-6(b). (Emphasis added).

The level of specificity that must be detailed for each item depends on the facts and circumstances surrounding each item. The Rhode Island Supreme Court has examined this requirement. See Tanner v. The Town Council of East Greenwich, 880 A.2d 784 (R.I. 2006). According to Tanner, the level of specificity that a meeting's agenda must meet is an area of the OMA not subject to bright line rules, and it is difficult to articulate a standard format that an agenda must follow. The circumstances and topics covered in a meeting for a particular public body will vary greatly necessitating that each agenda be reviewed on a case-by-case basis. It is generally accepted that an agenda must provide sufficient information to the public so that the

citizenry may be informed as to what matters will be addressed at a meeting and the agenda must not be misleading. Id. at 797-98. In Tanner, the Rhode Island Supreme Court stated that the determination of whether a statement adequately specifies the nature of the business to be discussed hinges upon "whether the notice provided by the [public body] fairly informed the public, under the totality of the circumstances, of the nature of the business to be conducted." Id.

This Department considered a similar issue in Beagan v. Albion Fire District, OM 09-20, wherein you alleged "[t]hat the District violated R.I. Gen. Laws § 42-46-6 by posting inadequate agendas for its February 26, 2008 meeting." Specifically, you alleged that the agenda items "Old Business" and "New Business'' was ''too vague." In that case we also began by discussing Tanner and stated:

> "we begin by 'acknowledg[ing] that reasonable minds can differ on what notice constitutes 'fair notice' in any given situation.' Tanner, 880 A.2d at 802. Having recognized this principle, however, we believe, given the totality of the circumstances, the February 26, 2008 notice for the open and closed sessions were grossly inadequate. As to the open session items labeled 'Old Business' and 'New Business,' for more than the past ten (10) years this Department has found broad agenda items, such as 'Old Business' and 'New Business' to be insufficient. See Okwara v. Rhode Island Commission on the Deaf and Hard of Hearing, OM 00-07; Blanchard v. Glendale Board of Fire Wardens, OM 97-13. Moreover, no sub-categories are delineated under these agenda items to provide further notice. Previously, we found the precise same agenda items violated the OMA with respect to the Fire District. See Albion Fire District Taxpayers Association v. Albion Fire District, OM 08-12."

Further, in Pinning / Reilly v. Providence Board of Park Commissioners, OM 07-08, we considered the agenda item "Superintendent's Report." In that matter, legal counsel represented that the "report" was simply an opportunity to make the Commissioners aware of various developments in the Parks Department. This Department found that a member of the public would not be fairly informed of the nature of the business to be discussed based only upon the statement, "Superintendent's Report." We explained that:

> "[i]n the past this Department has found similar broad agenda items, such as 'Old Business' and 'New Business,' which the instant agenda also contains, to be insufficient. See Okwara v. Rhode Island Commission on the Deaf and Hard of Hearing, OM 00-07; Blanchard v. Glendale Board of Fire Wardens, OM 97-13. Although this finding should not be read to mean that we believe every nuance to be discussed. . . must be advertised, we believe that some additional information should have been provided to give insight into what the Superintendent's Report would contain. If not, the 'Superintendent's Report' item is no more sufficient than an agenda item for 'New Business' or 'Old Business.' Moreover, in the case of matters emerging within forty-eight (48) hours of the meeting, the Commissioners could have voted to amend the agenda to ensure that last minute items, if any, were reflected in the agenda. See R.I. Gen. Laws § 42-46-6(b)."

Turning to the agendas for the August 10, 2010 and September 21, 2010 meetings, our review reveals that the August 10, 2010 agenda, in relevant portion, states:

IX. Old Business
X. New Business
XI. Good Welfare
    a. Correspondence
    b. Public Comment

The agenda for the September 21, 2010 meeting, in relevant portion, states:

IX. Old Business
    a. Discussion regarding missing Meeting Minutes
X. New Business
    A. Written Policy re direct payment for Accounts Payable to Glacial Energy
XI. Good and Welfare
    a. Correspondence
    b. Public Comment

Consistent with Tanner, our task here is to determine whether the statement of business provided by the Fire District in both the August 10, 2010 and September 21, 2010 agendas "fairly informed the public, under the totality of the circumstances," without being misleading, concerning what would be discussed at these two meetings.

We begin our analysis with the agenda and minutes of the August 10, 2010 meeting. You contend that the Fire District discussed and voted on issues under agenda items: "NEW BUSINESS" and "GOOD and WELFARE" that were not advertised. Our review of the minutes of the August 10, 2010 meeting reveal that the Fire District discussed multiple items under the broad heading "NEW BUSINESS" that were not advertised. Our review of the minutes also reveals that the Fire District not only discussed multiple unadvertised items under "NEW BUSINESS," but also acted/voted upon these unadvertised items. Specifically, at the August 10, 2010 meeting under agenda item "NEW BUSINESS," the Fire District discussed and/or voted to change its meeting schedule, "change to Glacial Energy for the supply side of [its] electric service and allow their monthly email bill to be processed," authorize payment for EMT courses for several firefighters and "to process payment for [the] Consolidation Committee Clerk." As we stated above, this Department is not suggesting that every nuance to be discussed must be advertised, however, we easily conclude in this case that advertising the broad agenda item "NEW BUSINESS" violates the OMA notice requirements and does not "fairly inform[ ] the public, under the totality of the circumstances of the nature of the business to be discussed." See Tanner, 880 A.2d at 797. In so concluding, we reject Attorney DeSimone's contention that the items discussed under "NEW BUSINESS" "were in the nature of a report from the chief of the fire district" and "ordinary business of the department" for which "[f]ormal votes are not required." Simply put, there is nothing on the August 10, 2010 agenda that provided the public any notice that the Fire District would discuss and/or vote to change its meeting schedule, "change to Glacial Energy for the supply side of [its] electric service and allow their monthly email bill to be processed," authorize payment for EMT courses for several firefighters and "to process payment for [the] Consolidation Committee Clerk" under the broad agenda item "NEW BUSINESS." Moreover, although the Fire District seems to suggest that the items discussed did not have to be discussed and voted upon at a Fire District meeting, there is no doubt these topic were discussed at a Fire District meeting and that adequate notice was not provided.

While we have little problem concluding that notice of "NEW BUSINESS" was too vague and insufficient, we cannot conclude that the notice of "GOOD and WELFARE" was also insufficient. You allege that the Fire District discussed certain correspondence and voted "to place this correspondence on file" under agenda item "GOOD AND WELFARE." Our review of both the August 10, 2010 agenda and minutes, however, show that the Fire District did so under the sub-category "Correspondence" delineated under agenda item "GOOD and WELFARE." Although "we acknowledge that reasonable minds can differ on what notice constitutes 'fair notice' in any given situation," Tanner, 880 A.2d at 802, we believe that the sub-category "Correspondence" provided sufficient notice under the OMA that correspondence may be discussed and/or voted upon and therefore this agenda item "fairly inform[ed] the public of the nature of the business to be discussed or acted upon." In doing so, we also note that our review finds the Fire District's sole action on this item appears to have been to place the correspondence on file.

Next, we turn our analysis to the agenda and minutes of the September 21, 2010 meeting. In particular, you challenge the sufficiency of agenda items: "GOOD and WELFARE" and "NEW BUSINESS."

You first allege that the Fire District improperly discussed certain correspondence and voted "to place this correspondence on file" under agenda item "GOOD AND WELFARE." You made this same allegation concerning the Fire District's discussion and vote on certain correspondence at its August 10, 2010 meeting. Our review of the September 21, 2010 agenda and minutes reveals that the Fire District discussed certain matters related to correspondences under the sub-category "Correspondence," which is delineated under the agenda item "GOOD and WELFARE." As we discussed earlier in this finding, we believe that the sub-category "Correspondence" provided sufficient notice under the OMA that correspondence may be discussed and/or voted upon and therefore this agenda item "fairly inform[ed] the public of the nature of the business to be discussed or acted upon."

Moreover, we find little merit in your contention that the Fire District improperly discussed a September 2, 2010 meeting under the same sub-category "Correspondence." Specifically, our review of the September 21, 2010 meeting minutes reveals that the Fire District's discussion and vote under this sub-category primarily concerned correspondence and not a September 2, 2010 meeting. In fact, reference to a September 2, 2010 meeting was only made in one sentence. Given the totality of the circumstances and our recognition that every nuance to be discussed may not have to be advertised, we cannot find that making a single reference to a September 2, 2010 meeting under the sub-category "Correspondence," without more, violated the OMA notice requirements.

Lastly, you contend that the Fire District discussed and voted on an unadvertised topic under the agenda item "NEW BUSINESS." We agree. Specifically, at the September 21, 2010 meeting under agenda item "NEW BUSINESS," the Fire District discussed and voted to enter into an agreement with Fire Recovery USA. Although the agenda reflects that the subcategory called "Written Policy re direct payment for Accounts Payable to Glacial Energy" was delineated under agenda item "NEW BUSINESS," the minutes of the September 21, 2010 meeting reveal that the discussion did not concern issues related to this subcategory. In fact, the minutes reveal that the discussion under this subcategory was broader than advertised since the Fire District

discussed direct payments to any creditor, as well as an unrelated matter pertaining to Fire Recovery USA. For all the foregoing reasons, we conclude that the agendas for the August 10, 2010 and September 21, 2010 meetings violated the OMA.

CONCLUSION

APRA violations

Upon a finding that a complaint brought pursuant to the APRA is meritorious, the Attorney General may initiate suit in the Superior Court. R.I. Gen. Laws § 38-2-9. There are two remedies in suits filed under the APRA: (1) a "court shall impose a civil fine not exceeding one thousand dollars ($1,000) against a public body or official found to have committed a knowing and willful violation" or (2) a "court shall . . . order a public body found to have wrongfully denied access to public records to provide the records at no cost to the prevailing party." R.I. Gen. Laws § 38-2-9

With respect to the APRA violations, this Department has concluded that the Fire District committed the following three (3) APRA violations: (1) The Fire District failed to respond to your August 18, 2010 and September 3, 2010 APRA requests for minutes of the February 1, 2006, May 23, 2006, and May 31, 2006 meetings within ten (10) business days; (2) The Fire District failed to indicate the procedure for appeal with respect to your September 29, 2010 APRA request for records pertaining to a certain property; and (3) the Fire District violated the APRA and OMA when it failed to keep written minutes for its May 8, 2006 and June 7, 2006 meetings and for its June 13, 2006 closed session.

Because the Fire District has responded to your APRA requests, injunctive relief is not appropriate. Moreover, while this Department has previously determined that the Fire District violated the APRA by failing to respond to APRA requests in a timely manner, see Beagan v. Albion Fire District, PR 09-19, Beagan v. Albion Fire District, PR 09-36, after reviewing the facts and circumstances of this particular case we decline to find a willful and knowing violation for the Fire District's untimely response with respect to your requests for its February 1, 2006, May 23, 2006, and May 31, 2006 minutes. In particular, we observe that although the Fire District did untimely provide access to these documents outside the ten (10) business day timeframe, the Fire District did timely provide you access to other minutes requested as part of the same APRA requests. The Fire District asserts that its failure to timely provide you access to the February 1, 2006, May 23, 2006, and May 31, 2006 minutes, while providing you timely access to other minutes, was the result of the lack of a coordinated filing system and personnel changes after the 2006 minutes were filed. These issues have been well documented in prior findings and will not be repeated here. Suffice to say, based upon this evidence, we conclude that the Fire District's violation was not willful or knowing.

OMA violations

Upon a finding that a complaint brought pursuant to the OMA is meritorious, the Attorney General may initiate suit in the Superior Court. R.I. Gen. Laws § 42-46-8(a). There are two remedies in suits filed under the OMA: (1) "[t]he court may issue injunctive relief and declare null and void any actions of a public body found to be in violation of [the OMA];" or (2) "[t]he court may impose a civil fine not exceeding five thousand ($5,000) dollars against a public

body or any of its members found to have committed a willful or knowing violation of [the OMA]." R.I. Gen. Laws § 42-46-8(d).

In the instant case, this Department has concluded that the Fire District violated the OMA by posting an insufficient agenda for its meetings dated August 10, 2010 and September 21, 2010. In particular, we find that the broad agenda item "New Business" failed to "fairly inform the public of the nature of the business to be discussed or acted upon." On multiple occasions, this Department has previously warned the Fire District that similarly broad agenda items violated the OMA. See Albion Fire District Taxpayers Assoc. v. Albion Fire District, OM 08-12; Beagan v. Albion Fire District, OM 09-20. For instance, in Albion Fire District Taxpayers Association, OM 08-12, we noted that "our review of the agendas and open session minutes [] finds that the Fire District appears routinely to discuss multiple items under the agenda items 'Old Business' and 'New Business" [and that t]hese agenda items do not provide a statement specifying the nature of the business to be discussed." Notwithstanding this advisement, one year later in Beagan, OM 09-20, we were faced with a similarly insufficient agenda item and explained that:

> "we begin by 'acknowledg[ing] that reasonable minds can differ on what notice constitutes 'fair notice' in any given situation.' Tanner, 880 A.2d at 802. Having recognized this principle, however, we believe, given the totality of the circumstances, the February 26, 2008 notice for the open and closed sessions were grossly inadequate. As to the open session items labeled 'Old Business' and 'New Business,' for more than the past ten (10) years this Department has found broad agenda items, such as 'Old Business' and 'New Business' to be insufficient. See Okwara v. Rhode Island Commission on the Deaf and Hard of Hearing, OM 00-07; Blanchard v. Glendale Board of Fire Wardens, OM 97-13. Moreover, no sub-categories are delineated under these agenda items to provide further notice. Previously, we found the precise same agenda items violated the OMA with respect to the Fire District. See Albion Fire District Taxpayers Association v. Albion Fire District, OM 08-12."

The Fire District was warned in both findings that these same actions/omissions discussed in the instant finding violated the OMA and may serve as evidence of a willful or knowing violation in a future similar violation.

Most recently, in Beagan v. Albion Fire District, OM 10-27, which was issued by this Department on November 18, 2010, we determined that the Fire District violated the OMA by posting an insufficient agenda for its meetings dated March 9, 2010, April 13, 2010, and May 11, 2010.[9] In particular, we noted that broad agenda items, which included "Old Business," and "New Business," failed to "fairly inform the public of the nature of the business to be discussed or acted upon." Id. at 5. Citing our repeated warnings and violations against the Fire District for similar violations, we subsequently determined that the Fire District had willfully and knowingly

[9] Because we recognize that the Fire District did not have notice of our finding in Beagan v. Albion Fire District, OM 10-27 at the time of its August 10, 2010 and September 21, 2010 meetings, we mention Beagan v. Albion Fire District, OM 10-27 merely for context.

violated the OMA in Beagan v. Albion Fire District, OM 10-27B. Accordingly, we filed a civil lawsuit against the Fire District in the Rhode Island Superior Court for willfully and knowingly violating the OMA on December 6, 2010. See Attorney General Patrick C. Lynch in his official capacity v. Albion Fire District, C.A. No.: 10-7084. That lawsuit is currently pending.

By letter dated February 4, 2010, Attorney DeSimone attempts to mitigate the instant OMA violation explaining that:

> "As you may be aware, the matters discussed are rather similar to the items set forth in the complaint filed by your office in the Providence Superior Court and have been addressed by the board of commissioners. The agenda has been modified by the district since the filing of the complaint before the court and the members of the commission and the clerk have attended a seminar sponsored by your office in an attempt to address the agenda and meeting issues of the complaint going forward. The complaint regarding the months herein is in essence the same addressed by the complaint which is directed to the term 'Old Business.' As part of this response, the respondent intends to rely on legal arguments to be provided in the action pending in the Providence Superior Court. Further the district has previously submitted the agenda of numerous fire districts throughout the state which mirror the exact language previously used by the district."

In this case, this Department is once again tasked with determining whether the Fire District's instant violation of the OMA was willful and knowing. We agree with Mr. DeSimone that the circumstances surrounding the OMA violation in this case are substantially similar to those that supported our determination of a willful and knowing violation of the OMA in Beagan v. Albion Fire District, OM 10-27. In that case, the Fire District provided a response addressing whether its violation was willful and knowing. Because this Department is faced with a similar issue and violation here, we do not believe a further response from the Fire District is necessary in order for us to make a determination about whether the instant OMA violation was willful and knowing. Indeed, in its response the Fire District notes that it "intends to rely on legal arguments to be provided in the action pending in the Providence Superior Court." In making our determination about whether the Fire District's August 10, 2010 and September 21, 2010 agendas willfully or knowingly violated the OMA, we observe that in Carmody, the Rhode Island Supreme Court examined the standard of "knowing and willful" conduct and concluded the statutory standard was satisfied when a person is cognizant of an appreciable possibility that they may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt. Carmody v. Rhode Island Conflict of Interest Com'n, 509 A.2d 453, 460-61 (R.I. 1986).

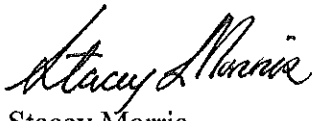
Applying the Carmody standard in this case leads us to an inescapable conclusion. Specifically, considering the history outlined above and our prior advisements, we must conclude the Fire District was cognizant of an appreciable possibility that its August 10, 2010 and September 21, 2010 agendas indicating "New Business" were insufficient and yet failed to take steps reasonably calculated to resolve the doubt. Carmody, 453 A.2d at 460-61. As we recently noted in Beagan v. Albion Fire District, OM 10-27, "[f]or at least thirteen years the agenda items

'Old Business' and 'New Business' have been deemed to violate the OMA." The Fire District attempts to mitigate the instant violation by focusing this Department's attention on its recent remedial efforts, bringing to light similar Fire District agendas and promising future compliance. Respectfully, in light of Carmody, we reject these arguments.

The history and prior findings set forth above makes clear that the Fire District failed to undertake any such remedial effort with respect to the notice violations discussed herein. It is quite possible, if not probable, that if the Fire District had undertaken such remedial efforts following our 2008 finding in Albion Fire District Taxpayers Association, or our 2009 finding in Beagan, we would not be faced with the circumstances presented in this case. The Fire District's failure to previously respond to our prior findings, however, leads us to the conclusion that the Fire District was on constructive and actual notice of the insufficiency of its agendas, yet failed to take steps reasonably calculated to resolve this doubt or remedy the violations. Carmody, 452 A.2d at 460-61. For these reasons, this Department will file a civil lawsuit against the Fire District for willfully or knowingly violating the OMA.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,



Stacey Morris
Special Assistant Attorney General

SM/pl

cc Louis DeSimone, Esquire